NO. 96-1693

In The

Supreme Court of the United States

October Term, 1996

FRANK X. HOPKINS, Warden of the
Nebraska Penal and Correctional Complex,

Petitioner,

v.

RANDOLPH K. REEVES,

Respondent.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The real question presented in the petition is identical to that answered in *Beck v. Alabama*, 447 U.S. 625 (1980): "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would support such a verdict?" *Id.* at 627.

INTERESTED PARTIES

The petioner is listed on the petition as State of Nebraska. The petition seeks review of a grant of a writ of habeas corpus under 28 U.S.C § 2254. The parties below were the respondent and Frank X. Hopkins, Warden of the Nebraska Penal and Correctional Complex.

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the Eighth Amendment, as indicated in the petition, this case involves the Due Process Clause of the Fourteenth Amendment, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

This case also involves Neb. Rev. Stat. §§ 28-303, 304, and 305 , which define the various degrees of murder under Nebraska law. The text of these statutes is set out in the decision below, petitioner's appendix at 6, nn.8 & 9 (hereafter "Appendix").

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari in which the petitioner asks this Court to depart from its established precedent to hold that state caselaw governing jury instructions in a capital case should preempt the protections afforded by the Eighth and Fourteenth Amendments. The decision of the Eighth Circuit Court of Appeals was a straightforward application of the rule announced by this Court in *Beck v. Alabama*, 447 U.S. 625 (1980), and does not warrant review by this Court.

FACTS

A recounting of facts beyond the selective version of the facts set out in the petition is in order. The relevant facts are as follows.

On the morning of March 28, 1980, the respondent, Randy Reeves, had planned to work at his construction job in Hastings, Nebraska, but the job was "rained out," so Mr. Reeves

and the rest of the crew went to a bar instead. From nine o'clock that morning and throughout the day and evening, Mr. Reeves and his friends continued to drink beer and other alcoholic beverages. During the afternoon, several members of the crew, including Mr. Reeves, traveled 100 miles to Lincoln. They visited friends, where they continued to drink, then went to a party. At the party, Mr. Reeves drank more alcohol and ingested peyote buttons. A friend who gave him a ride testified that by the time they left the party at about 1:30 a.m. on March 29, Mr. Reeves was "drunker than I'd ever seen him . . . . He appeared to be in a stupor." Mr. Reeves had this friend drop him off at an intersection that was a few blocks from the Quaker meeting house where his friend and cousin, Janet Mesner, was the live-in caretaker. *State v. Reeves*, 216 Neb. 206, 208-212, 344 N.W.2d 433, 438-440 (1984).

At 3:46 a.m. on March 29, Janet Mesner made a 911 emergency call and reported that she had been stabbed and that she thought that a friend in the house with her was dead from stab wounds. Police who responded found Ms. Mesner and the body of Victoria Lamm. Ms. Lamm's two-year-old daughter wandered out of a bedroom unharmed. In Ms. Mesner's bedroom, next to Ms. Lamm's body, was a billfold containing Mr. Reeves' identification. Underwear and a sock, found later to be Mr. Reeves', and a bloody kitchen knife, also were in plain sight. Ms. Mesner was transported to a hospital, where she told police Randy Reeves had stabbed her and raped her or tried to rape her. She repeatedly stated, "I don't know why Randy would do such a thing to me or to my girl friend." Janet Mesner died at approximately 5:55 a.m. *Id.*

Police arrested Mr. Reeves at 4:45 a.m. as he walked along a main street in Lincoln. At the time of his arrest, his eyes were red, and he had a great deal of blood on his body, including his penis, his hands and his clothes. In a police interview, Mr. Reeves responded

affirmatively when asked if he had had sex with Ms. Mesner. He also said that he could not remember much about the killings. A breath-alcohol test at 6:39 a.m. showed mescaline in his blood and a blood-alcohol concentration of .149 at the time. *Id.* Extrapolating back, this would indicate his blood-alcohol level at the time of the killings was as high as .230 *Reeves v. Hopkins*, 871 F.Supp. 1182, 1187 (D. Neb. 1994).

Mr. Reeves was charged with two counts of first-degree murder, solely on a felony-murder theory. He was not charged separately with any other crime. The defense requested, and was denied, jury instructions on second-degree murder and manslaughter. The defense stipulated to Mr. Reeves' having caused the deaths of the two women, and relied on a defense of insanity or, in the alternative, diminished capacity. At closing argument, the prosecutor admonished the jury that if the state did not win its case, Mr. Reeves would walk out of the courtroom a free man. The trial court refused to give a curative instruction, nor would the court instruct the jury on the consequences of an insanity verdict.[1] Mr. Reeves was convicted of both counts of first-degree murder and sentenced to death by a three-judge panel.

A unanimous panel of the Eighth Circuit Court of Appeals (Beam and Bowman, JJ.; and Bright, Senior Judge), reversing the district court[2], held that the refusal to instruct on a lesser-included offense contravened this Court's holding in *Beck v. Alabama*, 447 U.S. 625 (1980), and

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[1]The panel found this comment, together with the trial court's refusal to give the requested instructions, did not amount to an independent constitutional violation; it did, however, "heighten" Mr. Reeves' *Beck* claim. Appendix at 14, n.12.

[2]The district court had twice granted relief on other grounds, both of which the Eighth Circuit also reversed. Both courts, however, were in agreement that Mr. Reeves' case was fraught with error. Indeed, the district court, in vacating the death sentence, opined that upon resentencing, a new panel which "calmly reviews the evidence anew" would sentence Mr. Reeves to life and not death. *Reeves v. Hopkins*, 871 F. Supp. at 1195 n. 16.

conditionally granted a writ of habeas corpus. Rehearing was denied, both by the panel and *en banc*. *Reeves v. Hopkins*, 102 F.3d 977 (8th Cir. 1996), *reh'g denied* February 27, 1997.

REASONS FOR DENYING THE WRIT

I.

THE "QUESTIONS PRESENTED," AS IDENTIFIED IN THE PETITION, ALL HAVE BEEN ANSWERED IN *BECK*.

A. A Blanket Rule Prohibiting Instruction on A Lesser Included Offense in a Capital Case Violates this Court's Holding in *Beck*.

The petitioner describes certain differences between Alabama law, applicable in *Beck*, and Nebraska law. Petition at 8-11. In this case, however, as in *Beck*, the relevant question is whether a constitutionally unreliable conviction for a capital offense obtained because the "jury [was] forced into an all-or-nothing choice between capital murder and innocence." *Spaziano v. Florida*, 468 U.S. 447, 455 (1984). The State's protracted discussion of state law in its petition does nothing to address this dispositive question.

The state makes much of the fact that Nebraska juries do not participate in the sentencing process. But it is the jury's decision to *convict*, not its advisory sentencing function, which is central to *Beck*. Post- *Beck* decisions from the United States Supreme Court indicate that the *Beck* holding does not turn on the mechanics of the sentencing phase. *Spaziano, supra*; *Schad v. Arizona*, 501 U.S. 624 (1991). Although neither Spaziano nor Schad received relief from their death sentences, this Court in each case reiterated the essential holding in *Beck* that the constitution will not permit a jury to be presented with the stark choice between conviction of a

capital crime and outright acquittal.

The petitioner also insists that Nebraska state law, i.e. that felony-murder has no lesser-included offense, should preempt the due process protections recognized in *Beck*. Petition at 12-15. But, as Judge Beam observed in the decision below, "if this were true, then *Beck* itself would have been decided differently." Appendix at 9. *Beck* vindicates the Eighth and Fourteenth Amendment requirement that the life-or-death decision be "channeled so that arbitrary and capricious results are avoided." *Hopper v. Evans*, 456 U.S. 605, 611 (1982) (explaining *Beck*). Nebraska caselaw forbidding instruction on any lesser-included offense to felony-murder (*e.g. State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982)) frustrates that requirement.

At the time of Mr. Reeves' trial, Nebraska caselaw required that juries be instructed on a lesser included offense when the evidence so warranted. *See, e.g., State v. Hegwood*, 202 Neb. 379, 275 N.W.2d 605 (1979) (cited in *Beck*, 447 U.S. at 637 n. 12 to support assertion that no state other than Alabama forbids lesser-include-offense instruction in a capital case[3]). As Judge Beam noted in the decision below, the facts would have supported convicting Mr. Reeves for either second-degree murder or manslaughter. Appendix at 14. The overwhelming evidence of diminished capacity presented by Mr. Reeves would have justified conviction of manslaughter and acquittal of felony-murder. The facts of this case, combined with the *Hegwood* rule, render irrational and arbitrary the state's ban on the giving of a lesser-included-offense instruction in felony-murder cases. *Beck* teaches that a jury must be instructed on a lesser offense when the evidence so warrants -- not merely when state law so allows. *Id.* at 637.

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[3]Felony murder appears to be the sole exception in Nebraska law to the rule requiring instruction on lesser-included offenses. This exception was not mentioned in *Hegwood*.

It is inaccurate to suggest, as petitioner does at 8-11, that the jury in Nebraska plays no role whatsoever in the sentencing determination. The Reeves jury, as in all capital cases, had been death-qualified on voir dire, so they knew they were deciding a capital case. The jury in Mr. Reeve's case was forced into the position of rendering a *de facto* advisory death sentence, just as the *Beck* jury. The facts necessary to support a conviction in Mr. Reeves' case supplied the same factual basis for two statutory aggravating circumstances: the murder involved sexual abuse, and the crime involved two victims.[4] In Nebraska, under the felony-murder doctrine, the state is relieved of the burden of proving premeditation and malice. *See State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982).[5] The jury, then, was limited in its determination to finding of historical facts about the crime. It was prevented from exercising its traditional role of evaluating the moral blameworthiness of the defendant by selecting from various grades of the offense. The result: Mr. Reeves began the "official" sentencing process with findings constituting two aggravating circumstances, **despite the absence of a finding that he intended to kill**.

The fact that the panel of judges have ultimate sentencing power in Nebraska does not distinguish this case from *Beck*. As this Court said,"[W]e are not persuaded that sentencing by the judge compensates for the risk that the jury may return an improper verdict because of the unavailability of a 'third option.'" *Id.* at 645. To put the sentencing panel in such a position, this

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[4]Under Nebraska law, aggravating circumstance 1(d), "the murder was especially heinous, atrocious or cruel," has been intrepreted to involve murders involving "torture, sadism, or sexual abuse." *See State v. Reeves*, 216 Neb. 206, 226, 244 N.W.2d 433, 447 (1984).

[5]The jury in Mr. Reeves' case was instructed that intent to kill is conclusively presumed from the intent to commit the underlying felony. The Eighth Circuit declined to find this instruction violated *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Reeves v. Hopkins*, 102 F.3d 977, 985-986.

Court noted, is to place undue pressures upon the court, given the realities of contemporary public sentiment. *Id.* at 646.[6]

The decision of the court below represents no misapplication of this Court's precedent, as the petitioner suggests. Rather, it is a well-reasoned application of *Beck*, which sought to remedy precisely the circumstances of this case:

> Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Id. at 634 (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1971). By depriving the jury of a "third option," the state deprived Mr. Reeves of the full benefit of the reasonable doubt standard. *Beck*, 447 U.S. at 634.

It is difficult to conceive of a case in which *Beck*'s principle is more clearly implicated. This was a grisly and terrifying crime, but it was committed by a man who, though perhaps not legally insane, was clearly not in his right mind. Althought the evidence of that fact would have supported lesser-included offenses in any other kind of case, Nebraska's blanket prohibition of such instructions in felony murder cases gave the jury no option but to convict of capital murder, or set the defendant free. Just as in *Beck*, jury was reminded of this stark choice

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[6] For example, Mr. Reeves' sentencing panel inexplicably declined to find the statutory mitigation of intoxication, despite abundant evidence in the record that he was "obviously grossly impaired from intoxication." *Reeves v. Hopkins*, 871 F.Supp. at 1198. Further, the panel declined to weigh as mitigation certain letters it received from what it termed "opponents of the death penalty." The panel failed to note that many of those letters came from friends and relatives of both victims, including the parents of one victim. *Reeves v. Hopkins* 928 F. Supp. 941, 966-972 (D.Neb. 1996).

in the prosecutor's closing argument;[7] the jury understandably chose the only option that insured the defendant would not walk free. The Eighth Circuit correctly held that this was precisely the sort of error-prone process that *Beck* sought to avoid.

B. The Eighth Circuit has announced no new rule in this case.

Petitioner claims the circuit court ruling "creates a 'new rule' under *Teague v. Lane* [489 U.S. 288 (1989)]." Petition at 23. As a preliminary matter, we note that prior to the petition for writ of certiorari, the petitioner has **never** asserted *Teague* in the context of Mr. Reeves' *Beck* claim, in the federal district court or the court of appeals, including in his petition for rehearing with suggestion for rehearing en banc. Mr. Reeves, on the other hand, has asserted a *Beck* violation at every level of litigation, from pre-trial onward. Petitioner therefore should be deemed to have waived the *Teague* bar to the retroactive application of a new rule, just as any other affirmative defense would be waived for failure to assert it in a timely fashion. *E.g. Schiro v. Farley*, 510 U.S.222, 228-229 (1994) (State's *Teague* argument will not be entertained as it was not raised in brief in opposition to certiorari); *Hanrahan v. Greer*, 896 F.2d 241 (7th Cir. 1990) (state waived application of *Teague* doctrine by failing to assert it in district court).

In any event, *Teague*, which bars retroactive application of a new rule in a habeas corpus action, is inapposite here. "A case announces a new rule if the result was not dictated by precedent existing at the time a defendant's conviction became final." *Teague*, 489 U.S. at 301. As the respondent has demonstrated herein, *supra*, the Eighth Circuit decision is nothing more

[7]Beck's jury was told that if Beck was acquitted, "'he must be discharged' and 'he can never be tried for anything that he ever did to [the victim].'" *Beck*, 447 U.S. at 630. Mr. Reeves' jury was told essentially the same thing, notwithstanding his defense of insanity. *See supra* n.1.

than a straightforward application of the well-established rule of *Beck*.[8] It is not a new rule. The *Beck* decision was announced June 20, 1980, several months prior to Mr. Reeves' trial. Application of *Beck* in his case is by no means retroactive.

Even assuming *arguendo* the Eight Circuit decision *had* announced a new rule, under *Teague*, an exception to the doctrine of non-retroactivity would apply. *Teague* allows an exception for "'watershed rules of criminal procedure' implicating the fundamental fairness and *accuracy* of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (emphasis added). At the core of *Beck* is the need for accuracy in the guilt determination: "In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process. . . ." *Id.* at 642.. As this Court later stated, "[t]he goal of the *Beck* rule . . . is to eliminate the distortion of thte factfinding process that is created when the jury is forced into the all-or-nothing-choice between capital murder and innocence." *Spaziano*, 468 U.S. at 455 (cited in *Reeves*, Appendix at 7-8). The Eighth Circuit's application of *Beck* in this case fits foursquare into the *Teague* exception.

II.

NO SPLIT OF AUTHORITY EXISTS AMONG THE CIRCUIT COURTS OF APPEAL

The petitioner asserts that the Eighth Circuit decision below has created a direct

[8]The Eighth Circuit observed that the only difference between *Beck* and this case was immaterial: In *Beck*, the ban on lesser included offense instruction in capital cases was found in statute; in Nebraska, the ban is found in Nebraska caselaw. Either way, the law forbid instruction on a lesser-included offense even when, in Beck and in this case, the evidence warranted it. Appendix at 9.

split of authority with the Ninth Circuit opinion in *Greenawalt v. Ricketts*, 943 F.2d 1020 (9th Cir. 1991). The fact is, however, no split of authority exists. The Eighth Circuit did, as the petitioner asserts, disapprove the district court's reliance on *Greenawalt*. Appendix at 9. But *Greenawalt* does not present the issue as does *Reeves*. While Randy Greenawalt was charged solely on a felony-murder theory as to four homicides, he also was charged separately with each of the underlying felonies, including two counts of armed robbery, three counts of kidnapping, and one count of theft of a motor vehicle. He was found guilty on all counts. *State v. Greenawalt*, 128 Ariz. 150, 624 P.2d 828 (1981). The jury was not faced with the death-or-acquit dilemma sought to be avoided by *Beck*. *See Villafuerte v. Stewart*, No. 93-99015 (9th Cir. April 11, 1997), *substituted for Villafuerte v. Lewis*, 75 F.3d 1330, *withdrawn* (9th Cir. 1996), (declining to find a *Beck* violation in capital felony murder conviction because the jury was instructed on felonies in addition to murder and so "the all-or- nothing situation found intolerable in *Beck* was not present here." *Id.*, Slip op. at 5-6). The petitioner's contention that the Eighth Circuit opinion conflicts with the Ninth Circuit in *Greenawalt* is illusory.

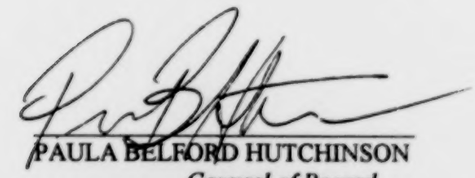
The courts of appeal, including the Eighth and Ninth Circuits, have repeatedly recognized that providing the jury with this all-or-nothing choice contravenes *Beck*. *Williams v. Armontrout*, 912 F.2d 924 (8th Cir. *en banc*1990); *Vickers v. Ricketts*, 798 F.2d 369 (9th Cir. 1986), *cert denied*, 479 U.S. 1054 (1987) (Kennedy, J.) (insanity defense does not satisfy the "third option" required by *Beck*); *Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir. 1988) (*Beck* violation arising out of trial court's refusal to give lesser-included offense instruction). When presented with appropriate facts, the courts of appeal recognize and correctly apply this Court's teaching in *Beck*.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

RANDOLPH K. REEVES, Respondent



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